IPOH GARDEN SDN. BHD. v. ISMAIL MAHYUDDIN ENTERPRISE SDN. BHD.

[O.C.J. (Abdoolcader J.) February 27, 1975]
[Ipoh — Civil Suit No. 287 of 1974]

Practice and Procedure — Attachment of property before judgment — Whether plaintiff has good cause of action — Whether there was intent to obstruct or delay on the part of the defendant — Land subject to restrictive condition in title — Approval of Mentri Besar for sale, charge or lease — Whether property in "custody" or under the "control" of Government — Debtors Ordinance, 1957, s. 19(1).

In this case the plaintiff had brought an action for the recovery of moneys refundable under an agreement for the sale of land. The defendant had obtained the land from the Government of Perak with a restrictive condition as to title, to wit, that the land was not to be sold, charged or leased without the approval of the Mentri Besar. The defendant had agreed to sell the land to the plaintiff and it was agreed that if the consent of the Mentri Besar was not obtained within three months of the date of execution of the agreement, the moneys paid by the plaintiff would be returned. After the filing of the suit the plaintiff applied for and obtained an order of attachment of the land. The defendant applied to set aside the order.

Held: (1) in this case the plaintiff had shown that he had a good cause of action and that the defendant with intent to obstruct or delay the execution of any judgment was determined to dispose of the land;

(2) the plaintiff was therefore entitled to the order attaching the land before judgment and the application to set aside the order of attachment must be dismissed;

(3) the condition of the title did not result in the attached property being under the control of the State Government and therefore the proviso to section 19(1) of the Debtors Ordinance did not apply and the attachment ordered was accordingly unaffected thereby.

Cases referred to:-

(1) *Kepong Prospecting Ltd.* v. *Schmidt* [1962] M.L.J. 375.

(2) *Bank of New South Wales* v. *Commonwealth* [1948] C.L.R. 1.

(3) *Pardoe* v. *Pardoe* (1900) 82 L.T. 547, 549.

(4) *Dollfus Mieg et Compagnie S.A.* v. *Bank of England* [1950] Ch. 333, 359.

CIVIL SUIT.

Datuk Sheik Abdul Rahman for the plaintiff.

K. K. Yeow for the defendant.

Abdoolcader J.: The defendant in these proceedings sought in an application by way of summons in chambers, which was later substituted by an amended summons in more elaborate form, to set aside an order of attachment before judgment made on October 1, 1974, by Arulanandom J. on an *ex parte* application by the plaintiff supported by affidavit.

The plaintiff's claim in this action is for moneys refundable under an agreement entered into with the defendant on November 29, 1972, to purchase certain lands alienated to the defendant by the Perak State Government in consideration of the payment by the plaintiff of a sum of $156,000 to the defendant and all sums payable to the Perak State Government by way of premium, survey fees, and other sums specified in the letter of approval from the Government. The plaintiff claims to have paid a total sum of $171,930 pursuant to the said agreement which together with the accrued interest thereon at the agreed rate amounted to $195,638.69 as at August 4, 1974. It was a term of the agreement that in the event of the defendant failing to obtain the necessary approval from the Mentri Besar for permission to transfer the said lands to the plaintiff within 3 months from the date of execution the agreement was to determine and the defendant within a month of such determination was to refund to the plaintiff all payments made by them under and pursuant to the agreement.

The plaintiff applied *ex parte* by summons in chambers on October 1, 1974, for an order of attachment before judgment of the property of the defendant specified therein being the land known as Lot No. 66429 situate in the Mukim of Ulu Kinta (hereinafter referred to as "the attached property") as a pledge or surety to answer the just demand of the plaintiff until the trial of the action and satisfaction of any judgment that may be made against the defendant, and this application was supported by an affidavit affirmed by the managing director of the plaintiff company. An order of attachment before judgment as prayed for was accordingly made on that day with liberty to the defendant to apply.

The defendant then applied by summons to set aside this order of attachment before judgment, presumably under the provisions of section 20 of the Debtors Ordinance, 1957, in addition to the stipulation for liberty to apply in the Order, on the grounds that the plaintiff had suppressed and misrepresented material facts and had not satisfied or complied with the requirements of section 19(1) of the Debtors Ordinance and in the alternative prayed that the Order of October 1, 1974, be modified to enable the defendant to charge the attached property so that funds could be raised for its development.

The provisions of section 19(1) of the Debtors Ordinance so far as they are relevant and material to this case read as follows:

"19. (1) If it is shown to the satisfaction of the court, at any time after the issue of a writ of summons, by evidence on oath, that the plaintiff has a good cause of action against the defendant, and —

(a) ...; or

(b) ...; or

(c) that the defendant, with intent to obstruct or delay the execution of any judgment which has been or may be made against him, has removed, or is about to remove, or has concealed, or is concealing, or making away with, or handing over to others, any of his movable or immovable property;

the court may order that the property of the defendant, or any part thereof be forthwith seized or attached by the appropriate officer as a pledge or surety to answer the just demand of the plaintiff, until the trial of the action and satisfaction of any judgment that may be made against the defendant; but such order shall not constitute the plaintiff a secured creditor if the defendant is adjudicated bankrupt:

Provided that any property of the defendant or debts due to the defendant if in the custody or under the control of or due from any Government or public officer in his official capacity, shall be seized or attached only with the consent in writing of the Minister of Finance in the case of the Federal Government or a Federal Officer, or the Chief Minister in the case of a State Government or State Officer."

An applicant for an order under this statutory provision must satisfy the court by evidence on oath that he has a "good cause of action", and that the defendant "with intent to obstruct or delay the execution of any judgment which has been or may be made against him", has removed, or is about to remove,

or has concealed, or is concealing, or making away with, or handing over to others, any of his movable or immovable property (*Kepong Prospecting Ltd.* v. *Schmidt*[1]).

There was indeed evidence on oath by way of affidavits affirmed to by the managing director of the plaintiff company substantiating the application for an order of attachment before judgment. It was abundantly clear to me that the plaintiff has a good cause of action and indeed the managing director of the defendant company in an affidavit affirmed to on October 11, 1974, while disputing the sum of $195,638.69 as claimed by the plaintiff and the date when interest began to accrue, admitted as true that a sum of $171,930 was indeed due and owing to them. He subsequently however, in an affidavit affirmed to by him on November 26, 1974, purported to retract that admission as made under a mistake or misconception of law. The admission of moneys owing to the plaintiff was substantiated and reinforced however by a letter dated August 19, 1974, from the defendant's accountants and secretaries, Robert Lim, Kwong & Co., wherein the said sum of $171,930 was confirmed as due and owing by the defendant to the plaintiff.

The defendant's managing director in his affidavits raised various matters by way of defence to the effect, for instance, that the defendant was not liable for the payment made by the plaintiff on February 8, 1974, to the Collector of Land Revenue, Ipoh, as the agreement of November 29, 1972, had in fact determined on March 1, 1973, under the provisions of clause 7 thereof. Even accepting this contention and disallowing the sum of $35,490 so paid by the plaintiff, there still would remain a substantial sum due and owing by the defendant. The defendant further sought to plead an agreement concluded between the parties on or about August 19, 1974, to settle this matter on certain terms and a payment of a sum of $10,000 to the plaintiff on the basis of that agreement by way of novation, and that this action was accordingly premature as the plaintiff was thereby precluded from instituting any proceedings before the expiry of 2 months from that date. I could however find no such novation and it was clear that this sum of $10,000 was accepted by the plaintiff without prejudice to their rights to institute proceedings for the recovery of what they claimed to be the full amount due to them; that this was so was evidence from a "without prejudice" letter dated August 29, 1974, written by the plaintiff's solicitors to Robert Lim, Kwong & Co., the defendant's secretaries and accountants, which was exhibited to an affidavit affirmed to by the plaintiff's managing director on October 16, 1974.

I reiterate therefore that I found that the plaintiff has a good cause of action and that the purported lines of defence raised by the defendant would be matters to be determined at the trial of the proceedings but would not affect the *ex facie* view I had taken of the matter. Indeed in the course of his argument as to whether or not the plaintiff has a good cause of action, Mr. K. K. Yeow, counsel for the defendant, conceded that there was a good cause of action.

I could not but arrive at the conclusion on the affidavits before me and the exhibits thereto that the defendant was about to make away with the attached property as it was clear from the letter of August 19, 1974, from the defendant's secretaries and accountants which I have already referred to and the affidavit of the defendant's managing director affirmed to on October 11, 1974, that the defendant proposed to develop the attached property and sell it at its improved value and that they proposed to charge the attached property for the purposes of raising funds for improvement thereto.

The pertinent question for consideration was whether or not there was any intent to obstruct or delay the execution of any judgment which might be made against the defendant. This requirement would be sufficiently fulfilled if the plaintiff satisfied the court of the existence of facts from which the inference should be drawn that there has been the required intent (*Kepong Prospecting Ltd.* v. *Schmidt, supra* at page 377).

On a perusal of the affidavits an intent to obstruct or delay on the part of the defendant was clearly evident as the attached property would seem to be the only asset of the defendant. It would be pertinent to bear in mind that the lands which were the subject-matter of the agreement of November 29, 1972, were in fact sold by the defendant to a third party on July 22, 1974, without the knowledge of or any intimation to the plaintiff, and the defendant took no steps whatsoever to apply the proceeds of that sale in payment of the moneys due to the plaintiff. The defendant's managing director in his affidavit affirmed to on November 26, 1974, purported to resile from his categorical admission made previously in his affidavit affirmed to on October 11, 1974, that a sum of $171,930 was in fact due to the plaintiff by the defendant, and in paragraph 9 of his later affidavit affirmed — somewhat hyperbolically, as it turned out — that the defendant had as at the date of the order of attachment and still has movable and immovable properties of substantial value which in his opinion would be more than sufficient to meet the just demand of the plaintiff. When I referred counsel for the defendant to this affirmation and asked for particulars of any other property of the defendant so that consideration could be given to a substitution of any such property for the attached property, he was not able to specify even one such asset of any substantial value or otherwise other than the attached property. This clearly exposed the fides or rather the lack of it on the part of the defendant and, in my view, evinced the necessary intent to obstruct or delay the execution of any judgment the plaintiff might obtain against them.

As I have mentioned earlier, the defendant in his application to set aside the order of attachment prayed in the alternative for a modification of the order to enable the defendant to charge the attached property so that funds could be raised for its development. When I enquired of counsel for the defendant how this could possibly be done and how in safeguarding the rights of the plaintiff the question of priorities would be affected in the event of the chargee purporting to enforce his rights, this prayer in the alternative was promptly abandoned. This again in my view went further to reinforce the conclusion that I

reached that there was in fact an intention to obstruct or delay on the part of the defendant for the purposes of section 19(1)(c) of the Debtors Ordinance. The intention of the defendant evinced in the affidavits clearly showed that the defendant was determined to dispose of the attached property which, as I have said, appeared to be the only asset of the defendant notwithstanding the extravagant assertion by the managing director of the defendant company which I have referred to, and in so doing to put it out of the reach of the plaintiff to satisfy any judgment they might obtain in these proceedings.

The final matter raised by the defendant which was the only one of any substance involved a consideration of the proviso to section 19(1) of the Debtors Ordinance. Counsel for the defendant referred to a restrictive condition in the title of the attached property which reads as follows:

"The land hereby alienated shall not be sold or charged or leased except with the approval of the Mentri Besar."

He contended that by reason of this condition the attached property, although registered in the name of the defendant, became property under the control of the State Government and that it could not accordingly be attached without the consent in writing of the Mentri Besar of Perak in the light of the proviso to section 19(1) of the Ordinance. Counsel for the plaintiff submitted in reply on this aspect that, once land has been alienated, an indefeasible interest was created in the registered proprietor with all rights vested in him and that "control" in the proviso to section 19(1) of the Ordinance referred only to physical control. He contended that the State Government had no physical control over the attached property and the control that it had by virtue of the condition of title referred to was not over the land but over the exercise of certain rights vested in the registered proprietor. No authorities were cited by either side on the meaning of the word "control" in the context of the proviso to section 19(1) of the Ordinance.

It was therefore necessary for me to consider and determine as *res integra* the connotation, purport and effect of the word "control" in the proviso to section 19(1). In *Bank of New South Wales* v. *Commonwealth*[2] Dixon J. (as he then was) referred to "control" as

"An unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than 'restraint', something equivalent to 'regulation'."

"Control" in the context of the proviso to section 19(1), in my view, is synonymous with superintendence and management (cf. *Pardoe* v. *Pardoe*[3]), and connotes authority to direct, restrict or regulate. I am fortified in this view by the juxtaposition of the words "custody" or "control" in the proviso in question. It is a fundamental rule in the construction of statutes that associated words *(noscitur a sociis)* explain and limit each other. The meaning of a doubtful word or phrase in a statute may be ascertained by a consideration of the company in which it is found and the meaning of the words which are associated with it. The rule *"noscitur a sociis"* is frequently applied to ascertain the meaning of a word and consequently the intention of the legislature by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis,* and referable to the same subject-matter. Especially must it be remembered that the sense and meaning of the law can be collected only by comparing one part with another and by viewing all the parts together as one whole, and not one part only by itself.

"Custody" in the context of the proviso connotes, in my view, an element of temporary physical possession and oversight with a view to protection, charge, preservation or guidance. "Custody" includes a measure of safekeeping and protection, and "control" of direction and domination. "Control" would, applying the doctrine of *noscitur a sociis,* mean domination, command, the fact of controlling or of checking and directing action — in effect in the context of the instant matter, that the Government must have power to direct the use or disposal of the attached property in some manner as it pleases. It is clear that possession of the attached property and that measure of control which goes with possession is with the defendant and not with the State Government. "Control" would therefore for the purposes of the proviso to section 19(1) cover the right to tell the defendant what is to be done with the attached property (*Dollfus Mieg Et Compagnie S.A.* v. *Bank of England*[4]).

A condition of the title to the attached property is that it is to be used solely for a batek factory and for no other purpose and that the batek factory is to be constructed within a specified period or an authorised extension thereof. It is therefore understandable that for the purposes of this condition the State Government would want to be apprised of any sale, charge or lease of the attached property which can only be effected with the approval of the Mentri Besar. There is, in my view, no power in the State Government, by virtue of the condition imposed requiring the approval of the Mentri Besar as a prerequisite to any sale, charge or lease, to direct the use or disposal of the attached property in some manner as it pleases. It is not necessary to go as far as counsel for the plaintiff has done when he contended that "control" in the proviso to section 19(1) must necessarily refer to actual physical control. It would suffice if there is an element of superintendence and management, as I have said earlier. The condition of title in question does not, in my view, in any way give powers of superintendence and management or direction of use or disposal of the attached property to the State Government. It merely requires the approval of the Mentri Besar before there can be a sale, charge or lease of the attached property. That in my view is not tantamount to "control" within the meaning of that word in the proviso to section 19(1), inasmuch as a landlord cannot be said to be in control of premises the tenancy of which his tenant is precluded from assigning without his consent.

I accordingly held that the condition of title in question did not result in the attached property being under the control of the State Government and that the proviso to section 19(1) did not apply and the attachment ordered was accordingly unaffected thereby.

It was argued before me that the plaintiff had suppressed or misrepresented material facts within

their knowledge in that this aspect of control of the attached property by the State Government and the matter of the novation of the agreement of November 29, 1972, as a result of negotiations for a settlement were suppressed, and that had these matters been disclosed the court would not have made the order of attachment. I could find no suppression or misrepresentation as alleged for, as I have stated, the connotation of the word "control" advanced by the defendant was misconceived as the condition of title I have referred to requiring the approval of the Mentri Besar for the sale, charge or lease of the attached property did not result in the attached property coming under the control of the State Government, and there was also no novation, as I have already said, since the plaintiff accepted payment of the sum of $10,000 with the express reservation that this was without prejudice to their right to institute proceedings for the recovery of the whole amount claimed by them.

For these reasons I dismissed the defendant's application to set aside the order of attachment before judgment with costs and certified that I required no further argument under the provisions of Order 54 rule 22A of the Rules of the High Court, 1957.

Defendant's application dismissed.

Solicitors: *Cheang Lee & Ong; Yook Woon & Yeow.*

RE DATUK JAMES WONG KIM MIN

[O.C.J. (Seah J.) April 19, 1975]
[Kuching — Originating Motion No. K.1 of 1975]

Habeas Corpus — Person detained under Preservation of Public Security Ordinance, Sarawak, 1962 — Ordinance had no extra-territorial effect — Ordinance declared to be a Federal Law — Effect of — Whether operation of law extended throughout Malaysia — Whether Federal Secretary had power to order a person to be detained in Peninsular Malaysia — Prerogative Remedies Ordinance (Cap. 47) — Preservation of Public Security Ordinance, 1962, s. 4 — Malaysia Act, 1963, ss. 73(3) and 74 — Federal Constitution, art. 159A.

Constitutional Law — Malaysia Act 1963 — Federal Constitution, art. 159A.

Constitutional Law — Colonial legislation declared federal law — Whether operation of law extended throughout Malaysia.

This was an application for a writ of *habeas corpus.* The applicant had been detained under an order issued by the Federal Secretary, Sarawak. The order of detention purported to be made under the Preservation of Public Security Ordinance, 1962 but directed the detention of the applicant in Taiping Prison, Perak. The Preservation of Public Security Ordinance, 1962, originally a Sarawak Ordinance had been declared to be a Federal Law by the Modification of Laws (Declaration of Federal Present Laws) (Sarawak) Order, 1965.

Held: (1) when the Preservation of Public Security Ordinance was enacted in 1962 its operation was limited as it was intended to limit its operation to the Colony of Sarawak only. The Ordinance had no extra-territorial effect;

(2) the legal effect of declaring the Preservation of Public Security Ordinance to be a federal law was to transfer the responsibility of administering the federal law to the Federal authority and to vest in the Federal Parliament the power to amend or to repeal the said law;

(3) the Modification of Laws (Declaration of Federal Present Laws) (Sarawak) Order, 1965 did not extend the operation of the Preservation of Public Security Ordinance throughout Malaysia and therefore the Ordinance and the Regulations made thereunder applied only to the State of Sarawak and have no legal force outside the State of Sarawak;

(4) as the court was not satisfied that the detention of the applicant in Peninsular Malaysia was lawful, a writ of *habeas corpus* would be issued for the production and the release of the applicant.

Cases referred to:-

(1) *Re Keenan & Anor.* [1971] 3 All E.R. 883.
(2) *Secretary of State of Home Affairs* v. *O'Brien* [1923] A.C. 603; [1923] All E.R. Rep. 442.
(3) *Re Mwenya* [1959] 3 All E.R. 525.
(4) *Assa Singh* v. *Mentri Besar, Johore* [1969] 2 M.L.J. 30.
(5) *Reg.* v. *Burah* (1873) 3 App. Cas. 889.
(6) *Hodge* v. *The Queen* (1883-84) 9 App. Cas. 117.
(7) *Macleod* v. *Attorney-General for New South Wales* [1891] A.C. 455.
(8) *Adegbenro* v. *Akintola* [1963] A.C. 614.
(9) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 M.L.J. 129.
(10) *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284.
(11) *Liversidge* v. *Sir John Anderson & Anor.* [1942] A.C. 206.

ORIGINATING MOTION.

Datuk David Marshall (*J. C. Fong* with him) for the applicant.

Abdullah bin Ngah, Senior Federal Counsel, (*Ahmad Fairuz bin Datuk S. A. Halim,* Senior Federal Counsel, with him) for the respondents.

Seah J.: At the conclusion of the hearing on March 7, 1975, I delivered a brief oral judgment holding that I was not satisfied that the detention of Datuk James Wong Kim Min at Kamunting Detention Centre, Taiping, Perak, Peninsular Malaysia, was lawful and I ordered that a writ of *Habeas Corpus Ad Subjiciendum* be issued in order that the said Datuk James Wong Kim Min be produced before the court on Monday, March 10, 1975 at 2.15 p.m. to be released. The said Datuk James Wong Kim Min was duly produced before the court at the appointed date and time and he was formally released by the court.

When I delivered the oral judgment I indicated that I would give my reasons in writing at a later date. This I now proceed to do.

This is an *ex parte* application for a writ of *Habeas Corpus Ad Subjiciendum* by the applicant, Datuk James Wong Kim Min under section 3 of the Prerogative Remedies Ordinance (Cap. 47). When the application first came up for hearing on February 10, 1975 I adjourned the application so that notice might be given to (a) Officer-in-Charge of Kamunting Detention Centre, Taiping, Perak, Peninsular Malaysia and (b) the Federal Secretary or Setiausaha Persekutuan of Sarawak. Pursuant to Rule 5 of the *Habeas Corpus* (Procedure) Rules I ordered that notice of the application should also be served on the Minister of Home Affairs or Menteri Hal Ehwal Dalam Negeri at Kuala Lumpur, Peninsular Malaysia. I also ordered that the formal hearing of the *ex parte* application be fixed for Monday, March 3, 1975 at 9 a.m.

At the formal hearing, Datuk David Marshall assisted by Mr. J. C. Fong appeared for the applicant;